# In the Supreme Court of the United States

October Term, 1995

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United States of America, et al., petitioners

v.

The Chesapeake and Potomac Telephone Company of Virginia, et al.

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National Cable Television Association, Inc., petitioner

v.

Bell Atlantic Corporation, et al.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. a. Respondents argue (Br. 13) that strict scrutiny extends to "bans * * * that tell speakers * * * , even in a content-neutral way, that they may not provide, at any time or place, speech to the audience and in the manner of their choosing." Even if that somewhat ambiguous formulation accurately states the law, it does not apply here, for 47 U.S.C. 533(b) does not foreclose respondents from an "entire medium of expression." Cf. *City of*

*Ladue* v. *Gilleo*, 114 S. Ct. 2038, 2045 (1994).[1] Respondents may offer video programming over their own local broadcast television stations (or even a national television network), and they may set up "cable channels" of their own programming, which could be disseminated over independently controlled cable systems. Under those arrangements and several others, respondents could show their own video programming.[2] See Gov't Opening Br. 30-31, 37-38. Respondents may not (absent a waiver) offer programming over their own cable systems in their service areas because of the regulatory problems with such an arrangement, but that specific and limited restriction is a "manner" regulation properly analyzed under intermediate scrutiny—just as the ban on ambulatory fairground proselytizing at issue in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), and the ban on residence-specific picketing at issue in *Frisby* v. *Shultz*, 487 U.S. 474 (1988), were so analyzed.

[1] Respondents rely heavily on *Ladue* for the application of strict scrutiny. While we do not question that *Ladue* expressed "particular concern with laws that foreclose an entire medium of expression," 114 S. Ct. at 2045, it is questionable whether *Ladue* applied strict scrutiny. The bulk of the discussion in *Ladue* assumed the applicability of intermediate scrutiny and concluded that the ban on residential signs failed that scrutiny. *Id.* at 2046-2047; see also *id.* at 2047 (O'Connor, J., concurring). In *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988), the Court stated, when discussing a hypothetical municipal ban on all newsracks: "Presumably in the case of an ordinance that completely prohibits a particular manner of expression, the law on its face is both content and viewpoint neutral. In analyzing such a hypothetical ordinance, the Court would apply the well-settled time, place, and manner test." That statement is directly contrary to respondents' formulation of the law. In any event, the Court need not decide whether restrictions on an "entire medium of expression" always require strict scrutiny, for, as we explain in the text, no such restriction is at issue in this case.

[2] For the same reasons, respondents' argument (Br. 34-36) that Section 533(b) fails to leave open ample alternative channels of communication is unfounded. Section 533(b) does not ban local exchange carriers (LECs) from the video medium, but permits them to gain direct access to audiences through the dominant mode of broadcast television, as well as through direct-broadcast satellite television and "wireless cable." See Gov't Opening Br. 37-38. Through those modes of delivery, LECs can have guaranteed access to their desired audience, without the need to rely on unaffiliated cable-system operators.



Respondents' reliance on *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995), is misplaced. There, the Court identified the problem with compelled inclusion in the parade as one of forced association with the *content* of a particular message. See *id.* at 2348, 2350. The Court distinguished *Turner Broadcasting System* v. *FCC*, 114 S. Ct. 2445 (1994), in which it applied intermediate scrutiny, on the basis that the must-carry rule at issue in *Turner* carried "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey[ed] ideas or messages endorsed by the cable operator." *Hurley*, 115 S. Ct. at 2348-2349 (quoting *Turner*, 114 S. Ct. at 2465). *Hurley* is therefore closer to a case involving regulation of content, albeit in the context of the right not to speak messages of a particular content, than to a case like this one.

b. Respondents also argue that Section 533(b) is content-based. The only distinction made by Section 533(b), however, involves the method by which a message is disseminated. The distinction is no more content-based than would be (for example) a regulation of live entertainment, but not television, in taverns. We agree that each method of presentation of an idea has its own important qualities, but that point does not convert a regulation of the mode of delivering a message into one governing the content of the message. See *Leathers* v. *Medlock*, 499 U.S. 439, 449 (1991) (tax applied only to cable services is not content-based).

Section 533(b) also does not present the threat of administrative discretion over speech. This is not a situation in which there is "unfettered discretion, coupled with the power of prior restraint." *City of Lakewood* v. *Plain*

*Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). The Federal Communications Commission (FCC) abjures authority to apply Section 533(b) based on the content of any message presented. See Gov't Opening Br. 21-22. Even if, in rare cases, it will be difficult to determine whether programming is covered by Section 533(b), those cases can be resolved without "need to evaluate the nature of the message being imparted." *Regan* v. *Time, Inc.*, 468 U.S. 641, 656 (1984). As long as the distinctions made are content-neutral, "perfect clarity and precise guidance [are not] required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989).

2. a. Respondents assert that there is a "mismatch" between the problem of cross-subsidization and the restriction enacted by Section 533(b). They question why cross-subsidization does not occur under the current regime, under which local exchange carriers (LECs) may operate video transport services without exercising editorial control. Resp. Br. 23. This is the same error as that made by the district court. See Gov't Opening Br. 25-27. The danger of cross-subsidization in the existing video transport market is small because the potential profit from that market is much smaller than the profits that can be derived from offering full cable services. See *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Inquiry and Notice of Proposed Rulemaking*, 3 F.C.C. Rcd 5849, 5857 (1988). The 1980 FCC staff study that reexamined the FCC's cross-ownership rules reached a similar conclusion, that LECs might not have the incentive to build a cable system unless they exercised substantial editorial control. J.A. 69. But if LECs were permitted to provide their own video programming over their transport facilities, the prospect of dominating the lucrative video programming market would provide a greater incentive for them to cross-subsidize transport costs. "Simply put, the removal of



§ 533(b) would make a video transmission monopoly more valuable to a telephone company." J.A. 332 (Owen reply affidavit). Congress has, accordingly, tailored the cross-ownership bar to the situation in which the danger of cross-subsidization is much more substantial. Respondents' underinclusiveness argument is thus ill-founded, as well as contrary to the principles favoring narrow tailoring in First Amendment jurisprudence.[3]

Respondents also argue (Br. 25-27) that the danger of cross-subsidization is attenuated because the FCC and several States have adopted price-cap regulation for common carrier telephone service. The FCC's price-cap rules, however, cover only interstate services of LECs (providing customers with access to long-distance companies), and do not address the cost to customers of LECs' monopoly local telephone service, which is regulated by the States. See *In re Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order*, 5 F.C.C. Rcd. 6786, 6787 (1990) (*Price-Cap Order*), aff'd on reconsideration, 6 F.C.C. Rcd 2637 (1991), aff'd *sub nom. National Rural Telecom Ass'n* v. *FCC*, 988 F.2d 174 (D.C. Cir. 1993). Most States have not adopted "pure" price-cap regulation for LECs; price-cap regulation remains controversial, and many consumer interests and state utility regulators maintain that rate-of-return regulation has advantages for local telephone customers. See *In re Policy and Rules Concerning Rates for Dominant Carriers*,

[3] Respondents also suggest (Br. 23-24) that LECs would have a strong financial stake in the success of an unaffiliated cable operator since they could obtain rental income from such an operator. But that rental income could be subject to traditional rate regulation by the States and would not be calculated as a share of the unaffiliated programmer's profits in the programming market. See Gov't Opening Br. 26. Even on the opposite assumption, the indirect benefits from cross-subsidization that could be obtained from that rental income, or from a five percent ownership share in a cable operator (Resp. Br. 23), are surely minimal compared to the benefits that could be gained from cross-subsidization if the LEC fully owned a cable system in its service area.

*Further Notice of Proposed Rulemaking*, 3 F.C.C. Rcd 3195, 3212, 3217, 3260 (1988). State rate-of-return regulation "in its present form has been with us for some time" (*Price-Cap Order*, 5 F.C.C. Rcd at 6789), and is not on the verge of disappearance.

b. Respondents argue (Br. 27-29) that Section 533(b) is not necessary to prevent LECs from discriminating against their competitors in affording access to essential facilities for the distribution of video programming. Experience teaches that common carriers have the incentive and opportunity to discriminate against their competitors when they are permitted to carry for their own benefit as well as others'. See *Delaware, L. & W.R.R.* v. *United States*, 231 U.S. 363, 370 (1913); *United States* v. *Reading Co.*, 253 U.S. 26, 60-61 (1920); *United States* v. *Elgin, J. & E. Ry.*, 298 U.S. 492, 504 (1936) (Stone, J., dissenting); Gov't Opening Br. 5-6 n.6. That problem has not been obviated in this context by the Pole Attachments Act of 1978, 47 U.S.C. 224, as respondents maintain. While that Act does set up a regulatory regime to mediate disputes between utility companies and cable operators over access charges, "nothing in the [Act] * * * gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators." *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 251 (1987). The Act confirms that LECs retain ownership rights in their utility poles, including the right to exclude access to potentially competing cable operators, and merely authorizes the regulation of rents charged by utilities that voluntarily lease pole or conduit space to cable operators. *Id.* at 251-252.

Although cable operators have not until now faced obstacles in gaining access to LECs' poles and conduits (Resp. Br. 27-28), that point is evidence of the effectiveness of Section 533(b), not its obsolescence. Because LECs may not compete with cable operators in their service areas, they have no incentive to exclude them from poles and conduits. The same would not be true if respondents were permitted to operate their own cable systems in their service areas. Respondents' pole attachment and conduit agreements typically provide for termination, by either party, on six months' notice (see J.A. 113, 211); thus, within six months of entering the cable market (or even anticipating entry), respondents could demand that competing cable operators remove cable wires from their utility poles. Even if LECs did not engage in such an obvious form of discrimination, they could use their control over their poles and conduits to frustrate competitors' ability to maintain the condition of their equipment. See Gov't Opening Br. 36.



Respondents suggest (Br. 28-29) that independent video programmers would benefit if LECs could offer another conduit for their programming, in competition with the incumbent cable systems. But it is doubtful that such programmers would benefit substantially if they faced two duopolists rather than one monopolist, or if LECs simply replaced the incumbent cable operators as monopolists. Independent programmers would benefit from a second conduit if they had some right of access, as under the common-carriage video dialtone regime planned by the FCC, but respondents deny that Congress can even require them to carry the voices of others over their video dialtone systems. Resp. Br. 44-45. In their view, the right to editorial control over video dialtone is an all-or-nothing matter, and they cannot be forced to share their networks with any other programmers. That argument confirms the FCC's insight in 1970 that LECs' control over the system of disseminating video programming could lead to an "arbitrary blockage of th[e] gateway." See Gov't Opening Br. 6.

c. Respondents also contend (Br. 29-32) that Section 533(b) cannot stand because "administrative convenience" is not sufficient to justify a regulation of speech

under intermediate scrutiny. The problem, however, is not one of convenience, but of efficacy. Cross-subsidization and discrimination are inherently difficult to detect and to prove. Because of that difficulty, the question for Congress was how to design a system for "the prevention of harm before it occurs." *Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 464 (1978). Congress decided to enact a prophylactic rule that protects video programmers from the threat of LECs' anti-competitive behavior by removing the incentive for that behavior. Absent the prophylactic rule, there will surely be greater incentive and opportunity for anti-competitive conduct by the LECs and greater difficulty in detecting that conduct. Congress's decision should therefore be upheld as a reasonable legislative determination that a prophylactic rule serves the government's important interests more effectively than some other "imaginable alternative that might be less burdensome on speech," *United States* v. *Albertini,* 472 U.S. 675, 689 (1985), for "[a]bsent this requirement, the [government's] interest would have been served less well." *Ward,* 491 U.S. at 800.[4]

The suggestion that courts and agencies have swept aside the accumulated evidence of the danger of anti-competitive behavior by LECs (Resp. Br. 30-31) is seriously overstated. When the D.C. Circuit approved the removal of the barrier to LECs' entry into the in-

[4] Section 533(b) is also not subject to attack on the theory that it penalizes speech with a "bad tendency," as *amicus* American Civil Liberties Union suggests (Br. 17). In *Gitlow* v. *New York,* 268 U.S. 652 (1925), the Court reasoned that the speaker's conviction was valid under the First Amendment because "the legislative body itself has previously determined the danger of substantive evil arising from utterances of a *specified character.*" *Id.* at 671 (emphasis added). But in Section 533(b), Congress was not concerned with utterances of a "specified character," or indeed of any character; the cross-ownership rule is content-neutral. Section 533(b) is not addressed to *speech* with a "bad tendency," but to economically motivated anti-competitive behavior in the market for cable services.



formation services market established in the Bell System modified final judgment, it observed that many "distinguished economists" had concluded that LEC participation in that market would be anti-competitive, and it acknowledged that those "distinguished experts may * * * be 'right'." *United States* v. *Western Elec. Co.,* 993 F.2d 1572, 1581-1582, cert. denied, 114 S. Ct. 487 (1993). The D.C. Circuit's decision was predicated on principles of deference to the regulatory decision-maker—there, the Department of Justice, which had concluded that, on balance, competition and consumer welfare would be increased by provision of information services by the Bell-affiliated LECs. *Ibid.*[5] Here, it is Congress (which is ultimately responsible for setting the nation's telecommunications policy) that has decided that competition in the cable services market requires exclusion of the LECs (in their service areas), and it is that decision that must be upheld as reasonable.

Moreover, it cannot be accepted that public statements by an agency expressing doubt about the wisdom or policy of a regulation are conclusive evidence of its unconstitutionality. Cf. *Rostker* v. *Goldberg,* 453 U.S. 57, 80-81 (1981). Adoption of that view would chill agencies from urging Congress to reexamine a law that is subject to non-frivolous constitutional doubt. In any event, neither the FCC nor other agencies have concluded that regulatory alternatives to Section 533(b) would eliminate all risk of anti-competitive conduct. The FCC has concluded that regulatory controls short of a cross-ownership bar would be "adequate," in the sense that the costs of effective

[5] The D.C. Circuit did not conclude, as respondents suggest (Br. 31), that any contrary conclusion about the costs and benefits of LEC entry into information services would have been clearly erroneous. It held only that, in light of the deferential standard of review to be applied to the Department of Justice's conclusions, it would have been clearly erroneous for the district court to find that the Department of Justice's conclusion was unreasonable. 993 F.2d at 1582.

regulatory oversight and any residual anti-competitive conduct that might escape such oversight would be outweighed by the benefits to competition of LEC entry into the cable services market.[6] It has not concluded that regulatory controls are equally effective as a cross-ownership bar in preventing all cross-subsidization and discrimination by LECs. Nor has it suggested that a contrary view is *unreasonable*—which is the standard under intermediate scrutiny. Cf. *Ward*, 491 U.S. at 799. The Department of Justice has also recommended repeal of Section 533(b), but it has closely tied the policy benefits from that repeal to elimination of LECs' monopoly on local telephone service, which would be a sea change in this country's telecommunications regulation. See Gov't Opening Br. 32 n.21.

d. Respondents stress (Br. 32-33) that Congress made no explicit findings in the statute or legislative history detailing the economic theories underlying Section 533(b). Since the bar was not controversial in 1984, when Congress codified it, there was no reason then for Congress to explain in detail the problems to which the bar was addressed. But before Congress reregulated the cable industry in 1992, the bar was "extensively considered by Congress in hearings, floor debate, and in committee." *Rostker* v. *Goldberg*, 453 U.S. at 72. That legislative history is "highly relevant in assessing the constitutional validity" of the statute (*id.* at 75), for it shows that the case had not been made to Congress's satisfaction that Section 533(b) was no longer necessary to protect the cable services market.

[6] See Gov't Opening Br. 32 n.21; *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 F.C.C. Rcd 5781, 5848-5849 (1990) (*Video Dialtone Order*), modified in part on reconsideration, *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 10 F.C.C. Rcd 244 (1994) (*Video Dialtone Reconsideration Order*).



In a 1990 report concerning legislation addressed in large part to the cross-ownership bar, the Senate Commerce Committee noted the substantial disagreement over whether anti-competitive acts would follow from entry of LECs into the cable market. S. Rep. No. 456, 101st Cong., 2d Sess. 4-8 (1990). It concluded that, because of concerns about "the potential for anticompetitive practices by telephone companies," the time was not ripe for repeal. *Id.* at 9. The Committee charged the FCC with further consideration of the issue (*ibid.*), but that charge is fully consistent with its own conclusion that repeal was not yet appropriate.[7]

A year later, the same Committee decided against taking action on the cross-ownership bar in the bill that eventually became the 1992 Cable Act, but it held hearings on another bill that would have repealed Section 533(b), at which it was provided with detailed reasons why the bar should be retained.[8] That bill never emerged from the Committee. The issue was also thoroughly aired in hearings in the House of Representatives, and supporters of the repeal took the issue to the floor of both Houses, where they expressed opposition to the 1992 Cable Act in part because it made no provision for entry

[7] Respondents note that, in its 1991 report on cable legislation, the Senate Commerce Committee stated that it had previously decided that the cross-ownership bar should be considered "separately." Resp. Br. 33 (quoting S. Rep. No. 92, 102d Cong., 1st Sess. 18 (1991)). Indeed, in a 1990 report on a cable reregulation bill, the Senate Commerce Committee did state that it would consider the matter of LEC entry into the cable market separately. See S. Rep. No. 381, 101st Cong., 2d Sess. 17 (1990). But the Committee considered that issue separately only two months later, and then decided against repeal of Section 533(b). See S. Rep. No. 456, 101st Cong., 2d Sess. 8-9 (1990).

[8] See *Cable-Instructional TV and S. 1200, Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 2d Sess. 115-139 (1992).

of LECs into the cable market. See Gov't Opening Br. 10 n.9, 33-34, nn.22, 23. But the push to repeal Section 533(b) failed, and in the 1992 Cable Act Congress took a quite different approach to structural problems in the cable market. Instead of opening up cable services to the full play of market forces—by, for example, allowing LECs to compete with incumbent cable operators—Congress decided to reestablish rate regulation to protect consumer welfare.

Given the wealth of information presented to Congress about the bar before the reregulation of cable in 1992, there can be no doubt that substantial evidence exists to sustain Congress's decision to exclude LECs from the cable market in their service areas. Hence, the statute's prophylactic approach to a complex problem is not based on "speculation and conjecture," but "targets a concrete, nonspeculative harm." *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371, 2377-2378 (1995). It should, accordingly, be upheld.

3. a. In a series of related arguments, respondents contend (Br. 36-45) that the Court should disregard the FCC's Third Report and Order, in which the FCC concluded that the "good cause" waiver provision of Section 533(b)(4) provides it with authority to permit LECs to provide video programming directly to subscribers in their service areas over a video dialtone system.[9] The Third Report and Order is a definitive administrative construction of Section 533(b)(4), which, under settled principles, must be taken into account when this Court addresses respondents' facial constitutional challenge to Section 533(b) as a whole. See *Forsyth County, Georgia* v. *Nationalist Movement*, 505 U.S. 123, 131 (1992); *City of Lakewood*, 486 U.S. at 770 n.11; *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S.

[9] Although respondents rely on mootness cases (Br. 37 n.32), we have not suggested the Third Report and Order renders their constitutional challenge moot.



154, 159, 162-163 (1971); *Poulos* v. *New Hampshire*, 345 U.S. 395, 402 (1953). Under those principles, the Court considers the agency's construction of any related provision that bears on the validity of the principal section under legal attack. See *Ehlert* v. *United States*, 402 U.S. 99, 106-107 (1971).[10]

The FCC's construction is not subject to change at the FCC's whim, as respondents imply. The FCC adopted that construction using the notice-and-comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. 553; any modification of the FCC's construction of Section 533(b)(4) would also have to be undertaken in conformity with the APA, and would be subject to judicial review as well. And although respondents suggest that, "[u]nless this Court affirms the judgment below, a principal basis of the FCC's actions would disappear" (Br. 39), that will not be true if this Court upholds the statute in light of the FCC's construction of Section 533(b)(4). If the Court upholds the statute as construed by the FCC, any subsequent rescission of that construction would only serve to revive quickly respondents' challenge to the complete cross-ownership bar.

b. Respondents insist (Br. 41-43) that the Third Report and Order should be disregarded because the FCC

[10] In *Ehlert*, the Court rejected the petitioner's challenge to his conviction for failure to submit to induction, which challenge was based on the contention that Selective Service regulations afforded him no opportunity to present a claim of conscientious objection that had "crystallized" after he received the induction notice. Although the Court concluded that the regulations under challenge did generally limit draft boards to considering conscientious objection claims filed before the mailing of the induction notice (402 U.S. at 100 n.1, 104-105), it stressed, based on assurances in a letter "from the General Counsel of the Department of the Army to the Department of Justice," that "late crystallizers" could present a claim of conscientious objection to combatant service after induction into the military (*id.* at 106-107). The Court concluded that the regime as a whole did not bar "late crystallizers" from the opportunity to present their conscientious objection cases.

has not specified the exact terms and conditions under which LECs will be allowed to provide video programming on their own video dialtone systems. There is no basis for any accusation against the FCC of undue delay; in fact, respondent Bell Atlantic requested that the FCC postpone issuance of its regulations until Congress completes action on pending telecommunications legislation.[11] Moreover, fashioning effective regulatory safeguards to replace the cross-ownership bar is a major undertaking. When the FCC recognized, in light of the adverse appellate rulings on Section 533(b), that provision might have to be made to permit LECs to offer their own video programming on their video dialtone systems, it quickly opened rulemaking and asked commenters to address the complex regulatory issues raised by such an arrangement.[12] Those issues include (a) the respective percentages of programming capacity that should be left under LECs' editorial control and should be open to common carriage; (b) "channel-sharing" mechanisms to ensure broad access to video dialtone systems; (c) protections to prevent LECs from misusing unaffiliated programmers' proprietary information; (d) safeguards against cross-subsidization, including accounting rules, structural separation of LECs' telephone and video affiliates, and rules governing transactions between those affiliates; and (e) access for independent programmers to LECs' poles and conduits.[13]

[11] See Letter of July 21, 1995, from Edward D. Young, III, Vice President and Associate General Counsel of Bell Atlantic Network Services, Inc., to Reed E. Hundt, Chairman of the FCC (lodged with the Clerk of this Court).

[12] The Fourth Circuit denied rehearing in this case on January 18, 1995. Pet. App. 109a-112a. The FCC opened rulemaking two days later. See *In re Tel. Co.—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking*, 10 F.C.C. Rcd 4617 (*Fourth Further Notice*). At that time, the government's petition for rehearing in the Ninth Circuit in a similar case was still pending.

[13] See *Fourth Further Notice*, 10 F.C.C. Rcd at 4629-4641. There is also no basis for respondents' suggestion (Br. 38 n.35) that the



The FCC has also made clear that it will grant waivers to LECs that agree to meet the safeguards that are eventually established. See Pet. Supp. App. 19a. The waiver authority therefore is not accurately characterized as a "grant of standardless licensing power" (Resp. Br. 42), for the FCC's discretion is strictly limited by its binding construction of its waiver authority. The restrictions on its discretion have been and will be "made explicit by textual incorporation [and] binding * * * administrative construction," *City of Lakewood*, 486 U.S. at 770, and so the dangers of censorship and self-censorship suggested by respondents do not exist. See also *Poulos*, 345 U.S. at 404-408.

c. On the merits of the FCC's construction of its waiver authority, respondents suggest that the second sentence of Section 533(b)(4) precludes the FCC from offering any generally applicable construction of "good cause" and limits it to case-by-case, fact-specific inquiries.[14] But while Section 533(b)(4) authorizes the FCC

FCC has acted in bad faith by prohibiting two LECs from providing their own programming over their video dialtone systems, notwithstanding an injunction against enforcement of Section 533(b). In both the *New Jersey Bell* and *Ameritech* cases cited by respondents, the FCC permitted a LEC to construct a video dialtone system in its service area. The FCC noted in both cases that the applicant had not requested permission to offer its own video programming over the system, and it therefore limited the approval in both cases to construction and operation of a purely common-carrier video dialtone system. See *In re Application of New Jersey Bell Tel. Co.*, 9 F.C.C. Rcd 3677, 3679 n.27 (1994); *In re Applications of Ameritech Operating Cos.*, No. W-P-C 6926, *et al.*, at 5 (Oct. 6, 1995). Those restrictions were reasonable, for dissemination of a LEC's own video programming over its video dialtone system raises much more complicated regulatory problems of cross-subsidization and discriminaiton than those presented by operation of a pure common-carriage system. Those regulatory problems are, of course, the heart of this case, and they are also the subject of the FCC's ongoing video dialtone rulemaking.

[14] Section 533(b)(4) provides:

> In those areas where the provision of video programming directly to subscribers through a cable system demonstrably

to grant waivers on a showing that the "particular circumstances demonstrated by the [applicant]" warrant a waiver, it does not prohibit the FCC from concluding that all cases falling within a certain class, defined in advance to give adequate notice to the public, will meet the requirement of good cause. Cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). With respect to the related authorization for waiver based on a showing that cable service in an area "demonstrably could not exist" unless offered by a LEC, the FCC has long had in place a generally applicable rebuttable presumption that such cable service could not exist if the proposed service area has less than a certain household density. See 47 C.F.R. 63.56(b)(2); 46 Fed. Reg. 31,418 (1981). Congress codified that rebuttable presumption by reference in the second sentence of Section 533(b)(4). See n.14, *supra*. Here, the FCC has similarly concluded that, as a rule, the provision of video programming over video dialtone systems, operated in conformity with regulations preventing anti-competitive behavior and in competition with an incumbent cable operator, will constitute "particular circumstances" demonstrating good cause. Pet. Supp. App. 13a. The LEC seeking a waiver must still show that its "particular" proposal to offer video programming on a video dialtone meets those requirements and therefore warrants a waiver.[15]

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could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

[15] Respondents also suggest that the FCC's construction of "good cause" is too broad (Br. 40 n.37), but "good cause" is not limited



The FCC's construction is not precluded by *National Cable Television Association* v. *FCC*, 914 F.2d 285 (D.C. Cir. 1990), as respondents contend (Br. 40). That case did not involve a situation in which the LEC would have competed with an incumbent cable operator, as will be the case with video dialtone; rather, the LEC would have built the first cable system in the community. Also, that case was decided before the litigation over the constitutionality of Section 533(b). The intervening technological developments and the courts' doubts about the constitutionality of Section 533(b) justified the FCC's revisiting its waiver authority, as the FCC explained in the Third Report and Order. Pet. Supp. App. 11a, 20a-21a.

d. Finally, respondents contend (Br. 43-45) that the Third Report and Order creates constitutional problems because it would require LECs to allow room for others on their video dialtone systems. That assertion is remarkable, for it is a repudiation of the more narrowly tailored alternative that the court of appeals suggested, *viz.*, that

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to dire emergencies. In general, "good cause" refers to something more than speculation. See, *e.g.*, *Schlagenhauf* v. *Holder*, 379 U.S. 104, 119 (1964) (good cause for ordering physical examinations under Federal Rules of Civil Procedure); *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 7-8 (1st Cir. 1986) (good cause for entering protective order); *Boeing Airplane Co.* v. *Coggeshall*, 280 F.2d 654, 659 (D.C. Cir. 1960) (good cause for enforcement of subpoena). Beyond that, "[t]here is no settled understanding of what 'good cause' means" (*Southern Ry.* v. *Lanham*, 403 F.2d 119, 126 (5th Cir. 1968)), and the phrase has been aptly described as "a relative and highly abstract term, [such that] its meaning must be determined not only by the verbal context of the statute in which the term is employed, but also by the context of the action and procedures involved and the type of case presented." *Wray* v. *Folsom*, 166 F. Supp. 390, 394 (W.D. Ark. 1958). See also *Dinko* v. *Wall*, 531 F.2d 68, 75 (2d Cir. 1976) ("'Good cause' is an elastic concept, and is often used as a shorthand summary of the underlying policy reasons why a litigant should be able to attain a specified result."). The FCC therefore has the discretion to interpret "good cause" in light of Congress's overarching policy in Section 533(b), the promotion of competition in the cable services market.

Congress could limit LECs to a fixed percentage of the available channels on a cable system and could require them to lease the balance on a common-carrier basis to unaffiliated programmers. See Pet. App. 47a-48a. It is also a repudiation of respondents' position in the lower courts, in which they suggested the shared-system arrangement as an alternative to Section 533(b).[16] But without the alterative proposed by the court of appeals, Section 533(b) must surely be upheld, for no other "obvious less-burdensome alternative" (Pet. App. 47a) effective to prevent anti-competitive conduct has been suggested by the lower courts.

In any event, the Third Report and Order's purported constitutional problems are without substance. The danger in the "compelled speech" cases invoked by respondents is that a speaker "may be forced either to appear to agree with [unwelcome] views or to respond." *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n,* 475 U.S. 1, 15 (1986) (plurality opinion). But, as the Court observed in *Turner,* must-carry rules in the cable context do not present the same risk, for the public understands that cable operators carry others' messages without endorsing the views expressed in those messages. 114 S. Ct. at 2465-2466; see also *PruneYard Shopping Center* v. *Robins,* 447 U.S. 74, 87 (1980). There is even less danger from "compelled speech" in the context of video dialtone systems, which would be operated by entities well known to the public to be common carriers of others' messages, prohibited from discriminating on the basis of the content of those messages.

[16] See Resp. C.A. Br. 65 ("Telephone companies that provide their own video programming over their own common carrier networks would remain subject to these nondiscrimination obligations. *Video Dialtone Order,* 7 FCC Rcd at 5850-51[.]"); Tr. C.A. Oral Arg. 27 ("[MR. TRIBE:] There are a lot of things that Congress can do. They can require sharing. They can enforce common carrier obligations to which we are subject.").



For similar reasons, respondents' intimation that the FCC's video dialtone regime effects an unconstitutional taking of their property (Br. 44-45) is without merit. The FCC's plan to allow LECs to speak over their own video dialtone systems does not "take" anything from respondents. To the contrary, it gives them something that they did not previously have, for, at its inception, video dialtone was designed to be a pure common-carriage system based on the current telephone network, over which the LECs could not disseminate their own messages.[17] Since a prohibition against common carriers' use of their facilities for their own benefit does not "take" their property within the meaning of the Fifth Amendment (see *Delaware, L. & W.R.R.* v. *United States, supra*), a more lenient rule, allowing common carriers some use of their own facilities but also requiring them to carry the signals of others, presents no constitutional difficulty.

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For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1995

[17] See *Video Dialtone Order,* 7 F.C.C. Rcd at 5783; *Video Dialtone Reconsideration Order,* 10 F.C.C. Rcd at 258-259.

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